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March 10, 2008

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VIA HAND DELIVERY

Thomasenia P. Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5963 (Club for Growth PAC)

Dear Ms. Duncan:

This office represents Club for Growth PAC ("Club PAC") and Pat Toomey as Treasurer of Club PAC (together referred to as "Respondents"). On their behalf, we hereby respond to the complaint ("Complaint") the Federal Election Commission ("FEC" or "Commission") has designated Matter Under Review ("MUR") 5963.

The Complaint, with no supporting evidence, alleges coordination between Club PAC and the campaign of Andy Harris in the 2008 Republican Primary in the First Congressional District of Maryland. Specifically, the Complaint alleges that Club PAC coordinated with the Harris campaign television and radio ads that Club PAC aired in the First District of Maryland in the week of January 14, 2008.

This allegation has no basis in fact or in the law. Club PAC acted independently at all times with respect to its communications in the First District. Accordingly, the Commission should find no reason to believe that Respondents violated the Federal Election Campaign Act, as amended, ("the Act") and dismiss the Complaint.

THE COMPLAINT

James Braswell filed the Complaint on January 15, 2008. The Complaint specifically alleges that Club PAC coordinated radio and television advertisements aired the week of January 14, 2008, with the Harris campaign. The Complaint bases this accusation on the fact that the Club PAC ads as well as purported Harris campaign materials mailed around the same time both referred to the fact that another Republican candidate for Congress, E.J. Pipkin, voted for Governor Martin O'Malley's budget in mid-2007.

The only direct connection between Club PAC and the Harris campaign noted in the Complaint is the fact that many contributors to the Harris campaign earmarked their

20044231446

Thomasenia Duncan, Esq.
March 10, 2008
Page 2

contributions through Club PAC "showing that the two organizations have been linked for several months." 2nd page of unnumbered Complaint. The Complaint otherwise is devoid of any additional facts or even allegations as to how the PAC advertisements were coordinated with the Harris campaign. Instead, the Complaint posits the following baseless assertion:

The negative attack ad released on January 11 meets the 'conduct' standard of 11 CFR § 109.21(d) because the ad's timing and content was [sic] clearly choreographed between Andy Harris's campaign committee and the Club for Growth PAC.

3rd page of unnumbered Complaint.

Taking coordination as given, the Complaint then alleges that Club PAC made excessive contributions to the Harris campaign by virtue of the purportedly coordinated ads and, for the same reason, that Club PAC's disclaimers on the ads should have followed the rules for in-kind contributions instead of the rules applicable to independent expenditures.

THE FACTS

In 2008, Club PAC did make independent expenditures in the First Congressional District of Maryland that featured the names or likenesses of candidates running in the 2008 Republican primary. According to the sworn testimony of the Executive Director of the Club for Growth ("Club"), the connected organization of Club PAC, Club PAC produced and disseminated ads in the First District completely independently of candidates, campaign committees, party committees, and their agents. Affidavit of David Keating ¶ 5, dated March 10, 2008 [hereinafter "Keating Aff."], attached hereto at Tab A. At the time of the Complaint, the ads disseminated by Club PAC in the First District only included television and radio ads aired between January 11, 2008, and January 24, 2008, for which Club PAC issued a press release. *Id.* ¶¶ 3-4. Nonetheless, the declaration of independence by Mr. Keating covers all ads aired by Club PAC in the First District this year. *Id.* ¶ 5. The absence of coordination encompasses all aspects of the advertisements, including the timing and content of the ads. *Id.* ¶¶ 5-15. It is the policy and practice of Club PAC not to coordinate its ads with any candidate, political party, or their agents. *Id.* ¶ 6.

29044231447

Thomasenia Duncan, Esq.

March 10, 2008

Page 3

No person associated with the 2008 Club PAC ads in Maryland had any conversations with Andy Harris, one of the candidates mentioned in the ads, his campaign, or any of its agents, in which Club PAC learned about the campaign's plans, projects, activities, or needs or conveyed the possibility that Club PAC might run independent advertisements or the particulars of any Club PAC advertisement such as the timing or content. *Id.* ¶ 6. Club PAC did not involve any person with, or agent of, the Harris campaign in the creation, content, or dissemination of the 2008 Club PAC ads in Maryland. *Id.* ¶ 8. Club PAC, acting independently, did not

- Create or disseminate any communications in the First District at the suggestion or request of the Harris campaign or of its agents; or
- Seek or receive assent from the Harris campaign or its agents as to any communication in the First District.

Id. ¶ 7. Moreover, Club PAC did not discuss with, or transfer any information from or to, the Harris campaign or agents regarding

- Any aspect of Club PAC communications; or
- Club PAC's plans, projects, activities, or needs.

Id. ¶¶ 6, 10. Further, Club PAC did not receive any information from the Harris campaign or its agents about the campaign's plans, projects, activities, or needs. *Id.* ¶ 9. Specifically, Club PAC received no information from the campaign or its agents about the timing or content of the Harris mailers mentioned in the Complaint. *Id.* ¶ 14.

Additionally, Club PAC did not employ any former employee or independent contractor of the Harris campaign. *Id.* ¶ 11. Finally, Club PAC did not retain for purposes of First District communication strategy, production, polling, or media buys any vendor common to the Harris campaign. *Id.* ¶ 12. Jon Lerner's Red Sea, LLC and Basswood Research performed these functions for Club PAC in the First District. *Id.* Mr. Lerner did not work for the Harris campaign. *Id.* Club PAC has always had a practice of making sure that vendors working on its ads do not also work for the campaigns of any candidates mentioned or featured in such ads. *Id.*

As to the content specifically alleged to be similar between the Club PAC advertisements and the purported Harris campaign mailer, *The Washington Times* published an editorial by Herb McMillan on December 10, 2007, that discussed E.J.

Thomasenia Duncan, Esq.
March 10, 2008
Page 4

Pipkin's vote for Governor O'Malley's budget earlier in the year. See <http://washingtontimes.com/apps/pbcs.dll/article?AID=/20071210/EDITORIAL/112100005/1013/editorial> (last visited March 10, 2008).

THE LAW

Each allegation in the Complaint derives from the issue of whether certain communications were "coordinated communications." "A payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution under 11 CFR 100.52(d) to the candidate" 11 C.F.R. § 109.21(b)(1).

Pursuant to section 109.20 of the FEC's regulations, "coordinated" means "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee or an agent of any of these entities." Further,

A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication:

- (1) Is paid for, in whole or in part, by a person other than that candidate, authorized committee, or political party committee;
- (2) Satisfies at least one of the content standards in paragraph (c) of this section; and
- (3) Satisfies at least one of the conduct standards in paragraph (d) of this section.

Id. § 109.21(a).

The content standards are not at issue in this MUR. On the other hand, the conduct standard is at issue and requires that certain types of conduct have taken place. The full text of the conduct standard is found at Tab B. Briefly, coordinated communications result from conduct such as making or disseminating covered content

- At the request or suggestion of the campaign or its agents;

Thomasenia Duncan, Esq.

March 10, 2008

Page 5

- With the material involvement of the campaign or its agents;
- After substantial discussions with the campaign or its agents;
- Using a common vendor; or
- Using a former employee or independent contractor.

Id. § 109.21(d).

DISCUSSION

The allegations contained in the Complaint about First District coordination are unfounded. As attested to by the Executive Director of Club for Growth, who has direct and personal knowledge of the activities that transpired, Club PAC did not engage in any activities that constituted coordination, through the timing or content of the television and radio ads or otherwise. For there to be a coordinated communication under the FEC's regulations, both the content and conduct factors must be fulfilled. *Id.* § 109.21(a). As can be seen below, Club PAC, consistent with its practice and policy, *see* Keating Aff. ¶¶ 6-12, did not transgress any of the coordination conduct factors and thus did not make an impermissible coordinated communication. Without the conduct proscribed in 11 C.F.R. § 109.21(d), there can be no finding of coordination.

Club PAC did not run any communications in Maryland at the request or suggestion of the Harris campaign or its agents. Keating Aff. ¶ 7. Club PAC also did not seek or receive assent from the Harris campaign for its ads. *Id.* Thus, 11 C.F.R. § 109.21(d)(1) was not violated.

Further, the Harris campaign and its agents were not involved in the development, creation, content, dissemination, or any other aspect of Club PAC's communications in the First District. Keating Aff. ¶ 8. *See* 11 C.F.R. § 109.21(d)(2). Club PAC personnel had no discussions with the Harris campaign or its agents about any aspect of Club PAC's First District communications. Keating Aff. ¶ 9. There were no discussions between Club PAC and their agents and the Harris campaign and its agents with respect to Maryland communications or Club PAC's plans, projects, activities, or needs. *Id.* ¶¶ 9-10. Club PAC did not receive any information from the Harris campaign or its agents about the campaign's plans, projects, activities, or needs. *Id.* ¶¶ 9, 14. Specifically, Club PAC received no information from the campaign or its agents about the timing or

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Thomasenia Duncan, Esq.

March 10, 2008

Page 6

content of the Harris mailers mentioned in the Complaint. *Id.* ¶ 14. Again, therefore, 11 C.F.R. § 109.21(d)(3) was not violated.

The vendors used by Club PAC for polling, political strategy, ad production, and media buys in the First District were Jon Lerner's Red Sea, LLC and Basswood Research. Keating Aff. ¶ 12. These entities did not also work for the Harris campaign. *Id.* As a result, there was no common vendor, and Club PAC did not violate the coordination conduct provision contained in 11 C.F.R. § 109.21(d)(4). This accords with the practice that Club PAC has employed with its vendors to ensure that they are not common to candidates featured or mentioned in its ads. *Id.*

Further, Club PAC did not employ a former Harris campaign staffer or independent contractor. Keating Aff. ¶ 11. Thus, the conduct standard for coordination found in 11 C.F.R. § 109.21(d)(5) was not met.

In particular, neither the timing of the Club PAC ads nor their content buttress the Complaint's allegations that coordination took place. The issue of Mr. Pipkin's 2007 vote for Governor O'Malley's budget was a matter of public record. For example, *The Washington Times* published an editorial on December 10, 2007, criticizing Mr. Pipkin for this vote. See <http://washingtontimes.com/apps/pbcs.dll/article?AID=/20071210/EDITORIAL/112100005/1013/editorial>. The timing, on the other hand, is coincidental. See Keating Aff. ¶ 14. Club PAC ran on its own accord its ads just after the holidays, a few days after the other Republican candidates went on the air, and approximately one month before the primary. *Id.*

Finally, the Complaint's link of the Harris campaign with Club PAC through earmarked contributions does not show any coordination. Club PAC undertook, and reported the costs of, the solicitation and transfer of earmarked contributions from members of the Club to the Harris campaign independently. Keating Aff. ¶ 15. The reports cited in the Complaint show no aspect of coordination – just that Club PAC and Club members supported Harris. If there were any communications with the campaign about problems with the delivery of earmarked member contributions, per Club PAC policy and practice, only the Club's Director of Operations or his assistants would have undertaken such communications and, in such an event, any such communications would have been limited to the problems with the contribution delivery. *Id.* Club PAC followed this policy with respect to its independent earmarked member contribution program for Andy Harris. *Id.*

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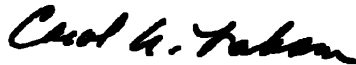
Thomasenia Duncan, Esq.
March 10, 2008
Page 7

In sum, in general and as to particular circumstances alleged in the Complaint, no coordination took place in the First District between Club PAC and the Harris campaign. The Complaint is in error both legally and factually and should be dismissed.

CONCLUSION

As the un-rebutted testimony above makes clear, Club PAC did not coordinate with the Harris campaign the content or timing or any other aspect of its independent expenditures in Maryland's First Congressional District. Since the advertisements were independent expenditures, Club PAC did not make excessive contributions to the Harris campaign, and the independent expenditure disclaimers featured on the advertisements accorded with Commission regulations. As a result, the Commission should find that there is no reason to believe any violations of the Act occurred and, hence, dismiss the entire Complaint.

Sincerely,



Carol A. Laham
D. Mark Renaud

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Press Contact—Nachama Soloveichik • 202.887.7039 • 646.528.1029

For immediate release—January 11, 2007

Club for Growth PAC Releases New Ad in Md-01 Gilchrest and Pipkin = Pelosi and O'Malley

Washington – Today, the Club for Growth PAC released a new television and radio ad in a \$250,000 ad buy across Maryland's First Congressional District (see ads [here](#)).

Entitled "Four of a Kind," the television ad points out that Wayne Gilchrest voted with Nancy Pelosi and liberal Democrats more often than any other Republican House member (CQ Politics) and that E.J. Pipkin joined the Democrats in voting for Governor Martin O'Malley's massive, big-spending FY 2008 budget (HB 50, 04/02/07). "Maryland Republicans deserve better than Nancy Pelosi and Martin O'Malley look-alikes," said Club for Growth President Pat Toomey. "They deserve a principled conservative like State Senator Andy Harris."

Entitled "Masquerade," the radio ad demonstrates that Gilchrest and Pipkin are pretending to be conservatives, but beneath their masks, they are two economic liberals who side with Pelosi and Governor O'Malley. Pipkin even voted for an eminent domain bill (HB 907, 04/04/05), giving the government the power to take private property from one person and give it to another and donated money to Democrat Kathleen Kennedy Townsend's campaign. That doesn't sound very conservative.

"No matter what Wayne Gilchrest and E.J. Pipkin say on the campaign trail, their records demonstrate that they are not conservative, and they will not fight for taxpayers in Congress," Mr. Toomey added. "In Congress, Gilchrest has a long record of voting for pork, voting for tax hikes, and voting against political free speech. In the Maryland State

Legislature, Pipkin has demonstrated a similar tendency, voting for massive increases in government spending and eminent domain abuse."

"In stark contrast, Andy Harris has a long track record of voting against bloated state budgets and fighting tax increases. If elected to Congress, Andy Harris will be a congressman Maryland Republicans can be proud of."

The \$250,000 ad buy will run on broadcast and cable television stations and radio stations in the Baltimore and Salisbury markets for two weeks. The scripts are below and documentation is attached.

TV: 30 "Four of a Kind"

Who's more liberal? Wayne Gilchrest or E.J. Pipkin?

In Washington, Gilchrest voted with Nancy Pelosi and liberal Democrats more often than other Republican in the entire Congress

It's a fact

Pipkin joined the liberals and voted for Martin O'Malley's massive, big-spending budget

Gilchrest or Pipkin?

[Laugh] That's like asking Pelosi or O'Malley

Maryland Republicans deserve better

Club for Growth PAC is responsible for the content of this advertising

Radio: 60 "Masquerade"

The Republican race for Congress in Maryland's First District has become a masquerade ball

Two candidates, Wayne Gilchrest and E.J. Pipkin, are liberals in disguise

Take off Wayne Gilchrest's mask and you'll find a congressman who voted with Nancy Pelosi more often than any other Republican

And E.J. Pipkin? He's at the same ball. Pipkin joined the liberals and voted for Martin O'Malley's massive, big-spending budget

Pipkin voted to expand eminent domain powers so government could take your private

property and give it to someone else

Pipkin even donated money to Kathleen Kennedy's campaign for governor

Fortunately, Maryland Republicans can end this dance

Andy Harris is a conservative who opposed the O'Malley budget and is endorsed by Governor Bob Ehrlich

On February 12th, vote for Andy Harris and send a conservative to Congress

Paid for by Club for Growth PAC. Clubforgrowth.org. Not authorized by a candidate or candidate's committee. Club for Growth PAC is responsible for the content of this advertising.

PAID FOR BY CLUB FOR GROWTH PAC AND NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE'S COMMITTEE. 202-955-5500.

The Club for Growth is a nationwide membership organization dedicated to advancing public policies that promote economic growth. The Club's website can be found at <http://www.clubforgrowth.org/>.

Nachama Soloveichik
Club for Growth
Communications Director
O: 202-887-7039
M: 646-528-1029

3/6/2008

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TABLE

The conduct standard of the Federal Election Commission's coordination regulations requires that one of the following types of conduct be present.

(1) *Request or suggestion.*

(i) The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion.

(2) *Material involvement.* This paragraph, (d)(2), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. A candidate, authorized committee, or political party committee is materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) *Substantial discussion.* This paragraph, (d)(3), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or the candidate's

authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

(4) *Common vendor*. All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor, as defined in 11 CFR 116.1(c), to create, produce, or distribute the communication;

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days:

(A) Development of media strategy, including the selection or purchasing of advertising slots;

(B) Selection of audiences;

(C) Polling;

(D) Fundraising;

(E) Developing the content of a public communication;

(F) Producing a public communication;

(G) Identifying voters or developing voter lists, mailing lists, or donor lists;

(H) Selecting personnel, contractors, or subcontractors;
or

(I) Consulting or otherwise providing political or media advice; and

(iii) This paragraph, (d)(4)(iii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source. That commercial vendor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

(5) *Former employee or independent contractor.* Both of the following statements in paragraphs (d)(5)(i) and (d)(5)(ii) of this section are true:

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days; and

(ii) This paragraph, (d)(5)(ii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the former employee or independent contractor was obtained from a publicly available source. That former employee or independent contractor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

11 C.F.R. § 109.21(d).